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## **An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010**

**Wei Zhuang**, *University of Geneva*

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# An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010

Wei Zhuang

## Abstract

On 11 December 2001, China officially became a Member of the World Trade Organization (WTO) after years of negotiations. The paper shows how a major developing country has used the WTO dispute settlement system by examining China's participation in the WTO dispute settlement mechanism from its entry through 31 December 2010. It provides a comprehensive analysis of the WTO dispute cases in which China has participated as a complainant, a respondent, or a third party.

**KEYWORDS:** China, WTO, dispute settlement, complainant, respondent, third party

**Author Notes:** Wei Zhuang, PhD Candidate (University of Geneva), Master in International Dispute Settlement (IHEID & University of Geneva), LL.M (Shandong University & Tilburg University). Currently, Ms. Zhuang is a guest researcher and scholarship holder at the Max Planck Institute for Intellectual Property and Competition Law. The author wishes to thank Mr. Peter Lunenborg for his comments, however, any errors are under the responsibility of the author.

## I. INTRODUCTION

The establishment of the World Trade Organization (WTO) in 1995 brought with it a dispute settlement mechanism (DSM), based on the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The new WTO DSU has been heralded as the anchor of the rule-based multilateral trading system and one of the crowning achievements of the Uruguay Round. It has transformed the power-based dispute settlement system under the 1947 General Agreement on Tariffs and Trade (GATT) into a rule-oriented system for the judicial settlement of trade disputes. The current WTO dispute settlement process, in contrast to the 1947 system, is time-efficient and strictly regulated. Moreover, the introduction of the reverse consensus principle for adoption of panel and Appellate Body reports and authorization of retaliation solved the problem of individual Member blockage that had existed under the GATT.

The WTO DSM derives its unique power as an international dispute settlement body from its exclusive and compulsory jurisdiction on matters arising under WTO agreements, its virtually automatic process, and its decisions' economic impact. Many trade quarrels have been resolved through this mechanism, and it has proven to be a central element in providing security and predictability to the current multilateral trading system.

Active and effective use of the WTO DSM can help preserve a Member's economic and trade interests. Moreover, participation in the WTO DSM is essential for shaping the interpretation and application of WTO law over time. While the WTO DSM does not formally adopt a common law approach, Appellate Body and panel reliance on and citation of past WTO jurisprudence suggest WTO law's common law orientation.<sup>1</sup>

After fifteen years of negotiation, China officially became the 143rd WTO Member on 11 December 2001, an outsized economy submitting to the exclusive and compulsory jurisdiction of the WTO Dispute Settlement Body (DSB). Notably, the WTO DSB is the only international 'court' of compulsory jurisdiction that China has recognized without reservation, and remains the only international judicial body to which China has resorted.<sup>2</sup>

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<sup>1</sup> Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, ICTSD Resource Paper No. 5 (2003), p. 11.

<sup>2</sup> China ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1993, but submits to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) only those disputes concerning compensation for expropriation and nationalization. In 1972, the People's Republic of China notified the UN Secretary-General that it did not recognize the compulsory jurisdiction of the International Court of Justice (ICJ), which the Republic of China had accepted in 1946.

This article shows how a major developing country has fared in the WTO dispute settlement system by examining China's participation in the WTO dispute settlement mechanism from its entry through 31 December 2010. Its main sections are devoted to China as respondent (Section II), complainant (Section III) and third party (Section IV), respectively. Each section explores China's participation frequency and counterparties (or involved parties), as well as the subject matter and status of its disputes. Section V concludes.

## **II. CHINA AS RESPONDENT**

### **A. The Transitional Period**

In terms of WTO dispute settlement statistics spanning from 1995 to 2010, China was a minor respondent, involved in only 21 of the 419 cases (roughly five per cent of all disputes). In contrast, the U.S. was the most challenged WTO Member (110 cases, or about 26 per cent), followed by the EU (70 cases, or about 17 per cent).<sup>3</sup> This is not only because China is a late-comer to the WTO, but also because there was only one complaint against China in the first five years after accession. These first five years are generally referred to as the 'transitional period.'

In the run up to WTO accession, China reached compromises—mainly with the European Communities (EC) and the U.S. —to delay the implementation of certain commitments concerning important industries. This was in accordance with China's negotiation objective to make commitments consistent with its development status (e.g., commitments that would not be too harmful to China's domestic industries).<sup>4</sup> These transitional periods were to last between three and five years.

For instance, in order to shield its automobile industry from growing foreign competition, China retained a system of car import quota licenses for three years. Similarly, China committed to grant rights to all domestic enterprises to import and export goods ('the right to trade') within three years after accession.<sup>5</sup> The longest transitional period was five years and mainly applied to several commitments in the service sector. Within five years of accession, foreign

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<sup>3</sup> WTO, *Disputes by country/territory*, available at:

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)>, accessed 4 January 2011.

<sup>4</sup> Other negotiation objectives for China included 'developing country' treatment within the WTO and an average bound import tariff level higher than the average of developed countries.

<sup>5</sup> Except for those goods listed in Annex 2A, which continue to be subject to state trading in accordance with the Protocol; See Protocol on the Accession of the People's Republic of China, WT/L/432 (23 November 2001), p. 4.

financial institutions would be permitted to provide services to all Chinese clients; there would be no geographic restrictions for telecommunication services, and wholly foreign-owned subsidiaries in the insurance sector would be permitted.<sup>6</sup>

There was no explicit 'peace clause' that would have forbidden WTO Members to bring a complaint against China immediately after its accession. For commitments subject to transitional periods, potential complainants had to wait until the end of that period. With respect to other commitments, the first case could have been initiated on 11 December 2001. While in these cases there was no explicitly agreed-upon transitional period, there was a '*de facto*' transition period. Legal authors such as Chad Bown considered that China had enjoyed a general five-year grace period following its accession.<sup>7</sup>

Several factors explain the existence of a *de facto* transition period, during which China remained free from litigation actions by other WTO Members. First, although China was already implementing major legal reforms during the accession negotiations, for instance, in the area of intellectual property (IP), China was (and still is) in a process of rapid change. In such an environment, deviations from WTO obligations during the reform process may be temporary, and could disappear once new regulation is fully implemented. WTO dispute settlement would be an ineffective way to enforce compliance when compliance is potentially imminent. Second, most WTO dispute settlement cases do not come from thin air or as a big surprise. They are the product of a long process, in which trade policy analysts systematically monitor foreign trade policy developments and identify the best cases, seasoned politicians and bureaucrats decide whether they are worth litigating, and experienced trade lawyers prepare for litigation.

These '*de jure*' and '*de facto*' transitional periods were crucial in preventing the early rush to litigation against China. Since their expiry, other WTO Members have adopted a clear strategy to fully engage in formal WTO dispute settlement to manage bilateral trade tensions with Beijing.<sup>8</sup> Therefore, examining dispute settlement activity since 2006 provides the most relevant comparison between China and other WTO Members.

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<sup>6</sup> "WTO successfully concludes negotiations on China's entry", WTO Press/243, 17 September 2001.

<sup>7</sup> Chad P. Bown, *U.S.-China Trade Conflicts and the Future of the WTO*, the Fletcher Forum of World Affairs Vol., 33: I (2009), 45.

<sup>8</sup> *Ibid.*, p. 45.

## **B. China Has Recently Emerged as the Leading Target In the WTO Disputes**

After the expiry of the transitional periods, as discussed above, China failed to bring some of its laws and regulations into conformity with the WTO Agreements or its Accession Protocol.<sup>9</sup> This caused frequent challenges by the major trading powers, such as the U.S. and the EU. In the period between 2006 and 2010, China found itself a respondent in almost a quarter of all WTO disputes, receiving complaints roughly four times per year. In the past five years, the number of cases against China (20) was greater than that against the U.S. (19) and the EU (17). Other large emerging economies—Brazil, Egypt, India, Indonesia, Mexico, Philippines, South Africa, South Korea and Turkey—have collectively been sued only nine times. From 2009 to 2010, China overtook the U.S. to become the most frequent respondent. Table 1 summarizes.

**Table 1: Top 3 Respondents and Other Large Emerging Economies, by Number of Cases: 2006-2010**

<b>Respondent</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Total</b>
China	3	4	5	4	4	<b>20</b>
U.S.	5	3	6	3	2	<b>19</b>
EU	3	3	4	4	3	<b>17</b>
Other large emerging economies	3	1	1	3	1	<b>9</b>
Total cases	20	13	19	14	21	<b>87</b>
<b>Share of cases with China as respondent</b>	<b>0.15</b>	<b>0.31</b>	<b>0.26</b>	<b>0.29</b>	<b>0.19</b>	<b>0.23</b>

*Note:* Cases are counted according to case numbers assigned by the WTO Secretariat.

What could explain the high number of cases against China? First, China is a large economy with a huge market. In mid-2006, it surpassed the U.S. as the world's second-largest exporter, and it overtook Germany as the world's top exporter in 2009. Large economies face a large number of cases, just as the U.S. and the EU have experienced.<sup>10</sup> China can therefore expect a caseload

<sup>9</sup> It is interesting to note that the commitments embedded in China's Accession Protocol have been a fertile source of disputes. Thus far, a vast majority of cases (17 out of 21) involved the Accession Protocol. The four cases which did not invoke the Accession Protocol include: China-Intellectual Property Rights (DS 362), China-Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union (DS 407), China-Electronic Payment Services (DS413) and China-GOES (DS 414).

<sup>10</sup> John H. Jackson, "The Impact of China's Accession on the WTO", in Deborah Z. Cass, Brett G. Williams and George R. Barker (eds.), *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), p. 27.

commensurate to its importance in world trade. Second, a Member with a relatively large and rapidly growing economy will come under increased scrutiny from other WTO Members, who want to check whether this growth was attained through illegal shortcuts. Third, it has been simply impossible for China to implement in such a short period the enormous legal commitments associated with its WTO accession. China's cultural tradition, legal concepts and economic norms diverge strikingly from those embedded in the WTO. As a WTO Member, China not only has to adhere to some 60 legally binding agreements, annexes, decisions and understandings adopted in the Uruguay Round negotiations, but also has to comply with its Accession Protocol. In order to implement these obligations, China enacted and (partially) amended 21 national laws related to trade. Between late 1999 and late 2006, China also adopted, revised or abolished about 100 administrative regulations, more than 1,000 ministerial regulations or policy measures, and about 200,000 local government regulations.<sup>11</sup> Given the enormous task China faced, it is not surprising that some of the new measures would not perfectly match its WTO commitments.

### **C. Counterparties: the U.S. and the EU Are the Major Complainants**

There are 21 WTO complaints naming China as respondent. The U.S. initiated more than half of these (11 cases), and the EU filed another four. Given its significant trade interests, it is not surprising that the U.S. is the top complainant. China is currently the second-largest U.S. trading partner, its third-largest export market, and its largest source of imports.<sup>12</sup>

Since China joined the WTO in 2001, trade between the U.S. and China has grown rapidly, and this growth has been very unbalanced, with the U.S. merchandise trade deficit rising from \$83 billion to \$273 billion in 2010.<sup>13</sup> In its 2010 Report, the U.S.-China Economic and Security Review Commission considered that the U.S. trade deficit with China was a major drag on the U.S. economy and "posed unprecedented challenges to U.S. economic health and security".<sup>14</sup> The Commission simply attributed the trade deficit to the openness of

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<sup>11</sup> "Director of the Legislative Affairs Office of State Council, Cao Kangtai: The Major Adjustment of Trade Laws and Regulations Five Years after China's Entry to the WTO", *Peoples' Daily*, 8 December 2006.

<sup>12</sup> Please note this list does not consider the EU as a single economy; otherwise, the EU is the largest trading partner of the U.S., followed by Canada and China.

<sup>13</sup> U.S. Census Bureau, *Foreign Trade Statistics: Trade in Goods (Imports, Exports and Trade Balance) with China* (Washington, 12 January 2011), available at: <<http://www.census.gov/foreign-trade/balance/c5700.html>>.

<sup>14</sup> U.S.-China Economic and Security Review Commission, *2010 Report to Congress of the U.S.-China Economic and Security Review Commission* (Washington, November 2010), pp. 27-28.

the U.S. market and the lack of market access to China.<sup>15</sup> In response to increased political pressure by the U.S. Congress, the U.S. government intensified the use of formal dispute settlement, in an effort to increase market access to China and eventually reduce this trade deficit.

Except for the U.S., the EU is the most frequent complainant against China. Currently, the EU is China's largest trading partner, largest export market, and largest source of technology import, while China is the EU's second-largest trading partner. In 2009, China became the EU's third-largest export market. The EU also has a large trade deficit in goods with China. However, the EU's global trade deficit with the rest of the world is much smaller than that of the U.S.<sup>16</sup> This might explain why the EU has challenged China less than the U.S.

Interestingly, Japan, South Korea (hereafter "Korea") and Chinese Taipei—also China's major trading partners—have never initiated any complaints against China in the WTO.<sup>17</sup> This is partially because more than half of China's exports are currently produced by foreign-invested enterprises, with companies in neighboring Japan, Korea and Chinese Taipei playing a major role in this process.<sup>18</sup> Also, these East Asian economies have had persistent bilateral trade surpluses with China. Furthermore, these societies are deeply influenced by Confucianism, and thus tend to use litigation as a last resort. Accordingly, Japan, Korea and Chinese Taipei are often third parties to complaints against China, but have never initiated any complaint against China.

Notably, five of the 11 cases initiated by the U.S. and three of the four cases initiated by the EU grew into 'joint complaints.' Joint complainants can share information and strategies with each other, and thus increase their legal skills and decrease litigation costs. Mostly North American Free Trade Agreement (NAFTA) Member states (Canada on two occasions and Mexico on three occasions) as well as Guatemala (in one instance) have joined either the U.S. or the EU in a complaint against China.

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<sup>15</sup> *Ibid.*, p. 27.

<sup>16</sup> For example, the U.S.'s global trade balance in 2010 was -500,027 million dollars; while the EU's global trade balance was -193 million dollars. See U.S. Census Bureau, *U.S. Trade in Goods and Services-Balance of Payments (BOP) Basis*, (Washington, 9 June 2011), available at: <<http://www.census.gov/foreign-trade/statistics/historical/gands.txt>>; "Euro zone trade surplus drops sharply in 2010", People's Daily Online, 15 February 2011.

<sup>17</sup> The absence of WTO disputes between mainland China and Chinese Taipei can also be explained by the particular circumstances of their political situation.

<sup>18</sup> European Commission, *Facts and figures on EU-China trade* (Brussels, 2009), available at: <[http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc\\_144591.pdf](http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144591.pdf)>.



#### D. Subject Matter of Cases against China: Subsidies, Services and Investment Stand Out

The WTO Secretariat tracks the main agreements at stake in each dispute settlement case and categorizes disputes according to four broad categories: (1) Goods: the GATT 1994 and agreements covered by its annex, such as the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Trade-Related Investment Measures (TRIMs); (2) Services: the General Agreement on Trade in Services (GATS); (3) Intellectual property: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and (4) Dispute settlement: DSU.

The cases against China substantially cover three trade sectors: goods, services and IP. The GATT 1994 dominated as the most frequently invoked agreement and was invoked in 16 cases, accounting for 35 per cent of all instances. The ASCM was invoked in ten cases (roughly 22 per cent). The GATS and TRIMs Agreement placed third and fourth, invoked in six cases (14 per cent) and five cases (13 per cent), respectively.

Compared to other WTO Members, China has received a greater share of complaints focused on subsidies and rules related to services and investment. On the other hand, the Agreement on Technical Barriers to Trade (TBT) and Agreement on Safeguards have never been invoked against China, despite invocation in five and four per cent, respectively, of all WTO disputes. These findings are summarized in Table 2, below.

**Table 2: Agreements Invoked in the Cases against China**

Agreement	Category	Invoked against China (number)	Invoked against China (share of total)	Invoked in all WTO cases (share of total)
<b>GATT 1994</b>	Goods	16	0.35	0.39
<b>SCM</b>	Goods	10	<b>0.22</b>	0.10
<b>GATS</b>	Services	6	<b>0.14</b>	0.03
<b>TRIMs</b>	Goods	5	<b>0.13</b>	0.03
<b>Agriculture</b>	Goods	3	0.07	0.08
<b>Anti-Dumping</b>	Goods	2	0.04	<b>0.10</b>
<b>TRIPS</b>	IP	2	0.04	0.03
<b>Rules of Origin</b>	Goods	1	0.02	0.01
<b>TBT</b>	Goods	0	0	<b>0.05</b>
<b>Safeguards</b>	Goods	0	0	<b>0.04</b>

*Note 1:* In most cases, more than one single agreement is invoked as the main ground for litigation

*Note 2:* Figures in bold signify WTO Agreements that are relatively more (or less) invoked against China

What could explain complainants' focus on subsidies, services and investment?

- *Subsidies and investment*: China has frequently designed measures that potentially constitute subsidies or trade-related investment measures to develop domestic manufacturing capability or promote certain industries to produce domestic goods with greater added value. One example is the 2004 policy on Development of Automotive Industry, which was challenged in *China-Auto Parts*. Another example is the 2005 *China-Grants, Loans and other Incentives* dispute, in which measures to support the development of famous export brands were challenged.<sup>19</sup>

Furthermore, the industries that China supports are often those in which developed countries are or want to become competitive on the world market, such as the automotive industry and renewable energy sector. For instance, in December 2010, the U.S. brought a complaint against China's financial support to wind power equipment manufacturers.

- *Services*: Before China's entry into the WTO, foreign participation in key service sectors, such as telecommunications, financial services and insurance, was nonexistent or marginal. By opening these service sectors through its WTO accession, China created high expectations among its trading partners that were not always met, especially in the first years following accession.

During negotiations with the WTO, China's accession team was mainly composed of representatives from the Ministry of Commerce. Border measures such as tariffs and quotas fall mainly under the competence of this Ministry whereas the regulation of service sectors is more complex and generally falls under the competence of several ministries and agencies. The Ministry of Commerce was not always fully aware of the implications of the market access and national treatment commitments it made to regulate service sectors, and other ministries and agencies were not always fully aware of WTO accession commitments. Without sufficient consultation with the relevant domestic regulators prior to its accession and continuous monitoring by the highest levels of the Chinese government, domestic regulators and other ministries may continue to issue rules and administrative guidance that reduce market access for foreign service providers to levels that fall short of China's WTO commitments.<sup>20</sup>

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<sup>19</sup> Chinese Ministry of Commerce et al., *Guiding Opinions on Supporting the Development of Famous Export Brands* (Beijing, 7 June 2005), available at: <<http://wms.mofcom.gov.cn/aarticle/xxfb/200506/20050600110961.html>>.

<sup>20</sup> Nicholas Lardy, *China & the World Trade Organization: Problems on the Road to Liberalization*, Brookings Institution Press (Washington, January 2002).

### **E. China either Settled Cases Early or Lost, Often After the Appeal**

A typical completed case in the WTO dispute settlement process involves four main stages: consultations, panel process, appeal and implementation. At all phases of this process, countries in dispute are encouraged to consult each other in order to settle "out of court," and the WTO Director-General is available to offer his good offices, to mediate or to help achieve conciliation.<sup>21</sup> An agreement could be reached between parties prior to a WTO ruling, which is known as "early settlement." Scholars have noted that this yields the most favorable policy outcome for WTO complainants.<sup>22</sup>

#### **1. China Shows Its Preference for Early Settlement**

Out of 21 complaints filed against China, 14 cases were closed or at the compliance stage as of 31 December 2010. Nine of the fourteen cases (about 64 per cent) were settled during consultations or at the panel stage, but long before a WTO panel had reached any ruling (i.e., early settlement through diplomatic channels). Table 3 summarizes these findings.

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<sup>21</sup> DSU, art.5.

<sup>22</sup> Marc L. Busch and Eric Reinhardt, *Developing Countries and GATT/WTO Dispute Settlement*, 37 *Journal of World Trade* 4 (2003), 720.

**Table 3: China as Respondent: Closed Cases as of 31 December 2010**

Case No.	Year	Complainant	Subject Matter	Status	Prevailing Party
DS309	2004	U.S.	Value-Added Tax on Integrated Circuits	MOU (2004)	Settled
DS339	2006	EU	Measures on Import of Auto Parts	AB Report (2008)	EU, U.S. and Canada
DS340	2006	U.S.			
DS342	2006	Canada			
DS358	2007	U.S.	Refunds, Reductions or Exemptions from Taxes and other Payments	Panel-MOU (2007)	Settled
DS359	2007	Mexico			
DS362	2007	U.S.			
DS363	2007	U.S.	The Protection and Enforcement of IPRs	Panel Report (2009)	U.S.
DS372	2008	EU			
DS373	2008	U.S.			
DS378	2008	Canada	Financial Information Services	MOU (2008)	Settled
DS387	2008	U.S.			
DS388	2008	Mexico			

In seven of the nine cases that ended in early settlement, China agreed to withdraw or modify its allegedly WTO-inconsistent measures prior to reaching the panel stage. The remaining two cases were settled soon after the panel was established:

- *China-Value-Added Tax on Integrated Circuits* (DS309): Arriving in March 2004, this was the first complaint that the U.S. filed against China. About two months later, the parties settled the dispute through a Memorandum of Understanding (MOU). According to the MOU, China was to stop providing value added tax refunds on integrated circuits produced domestically (or designed domestically but produced abroad).<sup>23</sup>

- *China-Taxes* (DS358, 359): In February 2007, the U.S. and Mexico requested consultations with China concerning measures granting refunds, reductions or exemptions from taxes and other payments. One month later, China adopted a new income tax law, and the U.S. and Mexico lost their main complaint target. A panel was established in August 2007, but the parties reached mutually agreed solutions well before the issuance of the panel report.

<sup>23</sup> Memorandum of Understanding between China and the United States Regarding China's Value-Added Tax on Integrated Circuits, WT/DS309/7(16 July 2004).

- *China-Measures Affecting Financial Information Services and Foreign Suppliers* (DS372, 373, 378): The U.S., the EU and Canada signed a MOU with China in 2008, the same year that this complaint was filed. The memorandum stipulates that foreign financial information suppliers would no longer be required to supply their services through an agent. Additionally, Xinhua News Agency would no longer be the regulator in charge of financial information services. Furthermore, confidential information provided to the regulator by foreign suppliers was to receive adequate protection, in accordance with China's laws and regulations.<sup>24</sup>

- *China-Grants, Loans and Other Incentives* (DS387, 388, 390): The U.S., Guatemala and Mexico worked cooperatively with China to reach a mutually agreed settlement in December 2009, under which China confirmed the termination of several subsidies that had supported the export of "famous brand" merchandise.<sup>25</sup>

In general, China was prone to concede to demands from counterparties and agreed to withdraw or modify its allegedly WTO-inconsistent measures within a year after the first consultation. China could have allowed its domestic industry more time to adjust by continuing litigation instead of relenting.<sup>26</sup> In the interim, China could have articulated its own interpretation of the often vague WTO provisions. However, it did not do so.

## 2. China Has Gained Limited Success

In the other five closed cases that did not reach early settlement, China appealed four panel reports. The outcome of each of these cases is described below.

- *China-Auto Parts* (DS 339, 340, 342): In this case, China for the first time exhausted DSU procedures through the Appellate Body stage. Sadly for China, the Appellate Body upheld the Panel's finding that Chinese tariffs imposed on imported auto parts were illegal under WTO rules. China implemented the DSB rulings in the agreed reasonable period of time.

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<sup>24</sup> Memorandum of Understanding between the People's Republic of China and the European Communities Regarding Measures Affecting Foreign Suppliers of Financial Information Services, WT/DS372/4 (9 December 2008).

<sup>25</sup> Office of the United States Trade Representative, *United States Wins End to China's "Famous Brand" Subsidies after Challenge at WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector* (Washington, 18 December 2009), available at: <<http://geneva.usmission.gov/2009/12/18/us-china/>>.

<sup>26</sup> The average time span between the establishment of a panel and the expiry of the reasonable period of time is 775 days, or over two years. If one begins counting from the request for consultations, the average period grows to 1,507 days, or over four years. See *Diagnosis of the Problems Affecting the Dispute Settlement Mechanism, Some Ideas by Mexico*, TN/DS/W/90 (16 July 2007).

- *China-Audiovisual Services* (DS363): In this case, the Appellate Body upheld the Panel's main finding that China's restrictions on the entitlement to import publications and audiovisual entertainment products were inconsistent with China's Accession Protocol, China's Accession Working Party Report, the GATS and the GATT 1994.

- *China-Intellectual Property Rights* (DS362): China did not appeal the Panel report in this case, and its active defense brought limited success. The Panel did not uphold one of the four U.S. claims, finding that the U.S. has not established that criminal thresholds were inconsistent with China's obligations under the TRIPS Agreement.<sup>27</sup> The agreed twelve-month reasonable period of time for China to implement the DSB rulings expired on 20 March 2010.<sup>28</sup>

Until now, China suffered defeat in almost every case that was not settled. Almost all of China's measures at issue were found to be inconsistent with WTO rules by the Panel or Appellate Body, requiring China to bring these measures into conformity with its obligations under the WTO agreements.

Nevertheless, continuing dispute settlement through the Appellate Body stage has advantages over early settlement. First, it has allowed China to delay the implementation of measures during the duration of the dispute settlement process. Thereafter, a reasonable period of time (ranging from over seven months to 14 months) has been allowed for China's implementation of the DSB recommendations and rulings. Second, active defense has been useful for China to gain dispute settlement experience and train its lawyers.

### III. CHINA AS COMPLAINANT

#### A. China Has Been Relatively Inactive as Complainant, but Is Transitioning Toward Assertiveness

The most active WTO complainants in the studied period were the U.S. and the EU, with 97 and 82 cases, respectively. In other words, these Members filed complaints, on average, roughly six times per year (once every two months) since

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<sup>27</sup> *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Report of the Panel, WT/DS362/R (26 January 2009), p. 134.

<sup>28</sup> China contended that it had completed all necessary domestic legislative procedures for implementing the DSB recommendations and rulings, while the U.S. said it was not yet in a position to share China's claim that it had implemented the DSB recommendations and rulings. On 8 April 2010, China and the U.S. notified the DSB of agreed procedures under Articles 21 and 22 of the DSU; See WTO, *Dispute Settlement: Dispute DS362 China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, available at: <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm)>, accessed 7 July 2011.

the establishment of the WTO. In contrast, China only initiated seven complaints after nine years of WTO membership. This means China initiated less than one case per year. Till December 2010, many other developing economies in the WTO complained more frequently than China. For instance, Brazil brought 1.7 cases per year to the WTO, Mexico 1.4, India 1.3, and Argentina 1. Table 4 below shows the most active litigants from 1995 through 2010.

**Table 4: Complaint Rate of Active Litigants 1995 – 2010 (Top 13)<sup>29</sup>**

WTO Member	No. of Complaints (A)	No. of being Respondent (B)	Cases initiated per year (average)	Cases defended per year (average)	Complaint Rate (R)
US	97	110	6.5	7.3	0.47
EU	82	70	5.5	4.7	0.54
Canada	33	16	2.2	1.1	0.67
Brazil	25	14	1.7	0.9	0.64
Mexico	21	14	1.4	0.9	0.60
India	19	20	1.3	1.3	0.49
Argentina	15	17	1	1.1	0.47
Korea	14	14	0.9	0.9	0.50
Japan	14	15	0.9	1	0.48
Thailand	13	3	0.9	0.2	0.81
Chile	10	13	0.7	0.9	0.43
Guatemala	8	2	0.5	0.1	0.8
China	7	21	0.8	2.3	0.26

*Note:* The complaint rate is equal to the number of complaints filed, divided by the number of instances as a party to a dispute ( $R = A / (A + B)$ ).

*Prima facie*, China's number of complaints is extremely low for a major trading power. Based on the results of a probabilistic model, Horn found that the U.S. and the EU tend to initiate more trade disputes mainly because they are involved in more trade—with a wider variety of trading partners—than other WTO Members.<sup>30</sup> Therefore, one could expect China's participation in the WTO dispute settlement system to increase in parallel with its share in world trade.

In simple terms, China's huge complaint deficit in the WTO signals that the country bites others much less frequently than it is bitten. The complaint rate indicates whether a WTO Member is active or passive in the WTO dispute settlement system. It is equal to the number of complaints a Member has filed,

<sup>29</sup> The countries in the table are those initiated more complaints in the WTO than China including China; see WTO, *supra* note 3.

<sup>30</sup> Henrik Horn, Petros C. Mavroidis and Hakan Nordstrom, *Is the Use of the WTO Dispute Settlement System Biased?*, CEPR Discussion Paper No. 2340 (1999).

divided by the number of instances in which it has been a party to a dispute. A figure of 0.5 means that a Member has ‘legal status balance’ in its utilization of the WTO DSM (i.e., this Member filed one complaint, and was also a respondent in one case). It can be seen from Table 4 that most Members have a complaint rate of about 0.5. China has the lowest complaint rate, 0.26, which is much lower than that of many other developing countries, for instance, the complaint rate of Brazil is 0.64, and Thailand’s rate reaches 0.81.

There are several reasons for China’s relative inactivity in the WTO DSM. First, deeply influenced by non-litigious legal traditions, China prefers to settle disputes behind closed doors, without a public ‘loss of face’ for either party. Second, China’s legal capacity is relatively low in comparison to that of developed countries, such as the U.S. and the EU, and even some emerging economies like Brazil. In these countries, there is a long tradition of formal litigation in courts, and an abundance of lawyers who are proficient in the WTO official languages (English, French and Spanish). Third, many countries have developed formal and informal private and public partnerships to identify foreign trade barriers, prioritize them according to their impact, and mobilize resources for WTO complaints. China does not yet have such strong and effective mechanisms. Finally, China’s accession package greatly limits the country’s right to complain, imposing discriminatory limits to market access for Chinese goods in foreign markets:

- China agreed to a transitional product-specific safeguard mechanism (TPSSM), allowing other WTO Members to impose restrictions on Chinese imports when it causes or threatens to cause market disruption rather than serious injury to the domestic industry for 12 years after accession.<sup>31</sup>

- China also accepted a discriminatory provision in anti-dumping cases brought against its goods in other markets—allowing the importing WTO Member to use a methodology not based on a strict comparison to domestic prices or costs in China—until 10 December 2016.<sup>32</sup>

- WTO Member reservations incorporated in the accession protocol also inhibit China from initiating WTO complaints. For example, Mexico listed some measures—subject to neither WTO Agreement provisions nor the anti-dumping provisions of the accession protocol—that would remain in effect for six years following China’s accession.<sup>33</sup>

Accordingly, before 2007, China initiated only one complaint against the U.S., joining the EU, Japan and Korea as co-complainant in a dispute over U.S. safeguards covering imported steel.

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<sup>31</sup> Protocol on the Accession of the People’s Republic of China, WT/L/432 (23 November 2001), section 16.

<sup>32</sup> *Ibid.*, section 15.

<sup>33</sup> *Ibid.*, annex 7.



However, facing rising protectionism and a distressed export sector, China soon realized that the cultural asset of non-litigious mores is not entirely compatible with the defense of Chinese trade and economic interests and the ability to influence trade rules through dispute settlement. In 2007, China filed its first independent complaint against the U.S., concerning preliminary anti-dumping and countervailing duty determinations. Since then, China has resorted to the WTO every year. In 2009 alone, China filed three independent complaints.

## **B. Counterparties: China Has So Far Targeted Only the U.S. and the EU**

All of China's complaints are against the U.S. and the EU because they are currently China's largest export markets and largest sources of technology imports. Further, in terms of litigation retaliation, filing a case against a country increases the likelihood that the respondent will file a complaint against the original complainant. In the studied period, the U.S. initiated 11 cases against China, and the EU initiated four; China initiated five complaints against the U.S. and two against the EU. This suggests that China's complaints, vis-à-vis the U.S. and the EU, are commensurate with the number of cases brought against it.

China has never initiated any complaint against other major developing country, despite the fact that some such countries have become remarkably active in their anti-dumping policies against China. Between 1 January 1995 and 30 June 2010, India filed 137 anti-dumping complaints against China, which is more than any other WTO Member, including the U.S. (101) and the EU (96). Turkey (57), Argentina (53) and Brazil (41) are also top anti-dumping users against China.<sup>34</sup> A reason for China's passive attitude towards developing countries could be the aforementioned special provisions or reservations in China's accession protocol, which allow trading partners to use anti-dumping and safeguards against Chinese exports with almost no restraint.

## **C. China Challenges Its Non-market Economy Treatment**

GATT 1994 is the most frequently invoked agreement (44 per cent) by China, followed by the Anti-dumping Agreement (25 per cent), Agreement on SCM (13 per cent), the Agreements on Agriculture (6 per cent), Safeguards (6 per cent) and SPS (6 per cent). Table 5, below, provides specific supporting data. All of China's complaints concern trade in goods and do not involve conditions of service supply

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<sup>34</sup> WTO, *Anti-dumping Measures: Reporting Member vs. Exporting Country 01/01/1995-31/12/2010*, available at: <[http://www.wto.org/english/tratop\\_e/adp\\_e/ad\\_meas\\_rep\\_exp\\_e.pdf](http://www.wto.org/english/tratop_e/adp_e/ad_meas_rep_exp_e.pdf)>, accessed 15 January 2011.

in other countries or any IP regime. This can be explained by China's current composition of exports, which are largely goods with low added value and a low level of IP content. Trade remedies are the most contentious issue. Over half of China's complaints (four out of seven) concern the U.S. and the EU anti-dumping measures, and another two complaints target U.S. safeguards.<sup>35</sup>

**Table 5: Agreements Invoked by China**

Agreement	Category	Invoked by China (number)	Invoked by China (share of total)	Invoked in all WTO cases (share of total)
<b>GATT 1994</b>	Goods	7	0.44	0.39
<b>Anti-Dumping</b>	Goods	4	0.25	0.1
<b>SCM</b>	Goods	2	0.13	0.1
<b>Agriculture</b>	Goods	1	0.06	0.08
<b>Safeguards</b>	Goods	1	0.06	0.04
<b>SPS</b>	Goods	1	0.06	0.04

Non-market economy (NME) status is the main source of frequent trade remedy investigations against China, which places China at a considerable disadvantage in anti-dumping actions.<sup>36</sup> Around one third of the WTO Members, including the U.S. and the EU, have not recognized China's market economy status so far.<sup>37</sup> In the WTO framework, Members are explicitly allowed to treat NME countries differently from market economies in anti-dumping cases.<sup>38</sup> Further, as mentioned above, China's accession protocol allows other WTO Members to apply non-market methodologies in their antidumping investigations against allegedly dumped Chinese exports for 15 years following accession.

Accordingly, WTO Members frequently take advantage of the opportunity to disregard China's costs of production and sales prices. Instead, they often choose a surrogate country with a market economy near the same level of development as China, but where costs and local prices are much higher than in China. This increases the likelihood of a determination of 'dumping'. It permits other countries to easily erect tariff barriers to China's exports. Consequently, products originating in China are subject to higher (and sometimes prohibitive)

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<sup>35</sup> See table 6 below.

<sup>36</sup> According to UNCTAD, an NME is an economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as was the case in the former Soviet Union. In contrast, a market economy depends heavily upon market forces to allocate productive resources. See UNCTAD, *UNCTAD Automated Systems for Customs Data (ASYCUDA), Glossary of Customs Terms*, available at: <<http://www.asycuda.org>>, accessed 29 January 2011.

<sup>37</sup> "China, U.S. to Further Discuss China's Market Economy Status", People's Daily Online, 25 May 2010.

<sup>38</sup> GATT 1994, art. VI.

anti-dumping duties. Resort to WTO litigation is the most important means to safeguard the interests of China's export enterprise. In the short run, China aims to remove market barriers for a particular product; at a more systemic level, China challenges its NME treatment by the U.S. and the EU.

Between 2001 and 2010, the U.S. applied only one global safeguard (to steel products). It was subsequently challenged by several WTO Members, including China. In the same time period, the U.S. International Trade Commission (ITC) conducted seven China-specific safeguard investigations under Section 421, finding violations in five instances.<sup>39</sup> In 2009, President Obama decided to impose import duties of 35 per cent in the first year on Chinese passenger and light truck tires, which would decrease to 30 per cent in the second year and 25 per cent in the third. This is the first time that the U.S. imposed "market disruption" safeguards on imports from China and the measure was subsequently challenged by China in the *US-Tire* dispute.

Section 421 of the U.S. Trade Act of 1974 was added to U.S. trade law by the US-China Relations Act of 2000. It implements TPSSM—contained in Section 16 of China's Accession Protocol—until December 2013, and authorizes the President to impose safeguards on Chinese goods if domestic market disruption is found. Under Section 421, market disruption occurs whenever imports of a Chinese product that is like or directly competitive with a domestic product increase rapidly, so as to be a significant cause or threat of material injury to the domestic industry. Section 421 has a lower threshold for demonstrating possible harm and securing temporary relief.

#### **D. The Difficulty of Substantially Prevailing Over the U.S.**

This portion of the article depicts the current status of China's complaints. By the end of 2010, all of them moved to Panel proceedings except *U.S.-Coated Free Sheet Paper* (DS 368). Three cases were closed. One panel report was appealed, and the other two panel reports were circulated. Table 6 below provides a complete overview.

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<sup>39</sup> Gary Clyde Hufbauer and Jared C. Woollacott, *Trade Disputes Between China and the United States: Growing Pains so Far, Worse Ahead?*, Peterson Institute for International Economics, Working Paper Series 10-17 (December 2010), p. 22.

**Table 6: China as Complainant**

Case No.	Year	Respondent	Subject Matter	Status (31 December 2010)
DS252	2002	U.S.	U.S. Safeguard Measures on Steel Imports	AB report (2003) favors China
DS368	2007	U.S.	Dumping & Subsidies-Coated Paper	Terminated (2007)
DS379	2008	U.S.	Dumping & Subsidies-Certain Products	Panel report (2010) favors U.S.; appealed
DS392	2009	U.S.	Denial of Poultry Imports	Panel report (2010) favors China; adopted
DS397	2009	EU	Dumping-Iron & Steel Fasteners	Panel report (2010) favors China; circulated
DS399	2009	U.S.	Safeguard-Tire Imports	Panel report (2010) favors U.S.; circulated
DS405	2010	EU	Dumping-Footwear Imports	Panel established (2010)

#### 1. Case Terminated Before the Panel Proceedings

In 2007, China filed its first independent complaint, *U.S.-Coated Free Sheet Paper* (DS368), which indicated that the Chinese government's attitude towards WTO litigation had changed. However, it was a short-lived dispute because China filed the challenge prematurely, suggesting that China still lacked experience and legal acumen.<sup>40</sup>

In the U.S., anti-dumping and countervailing duty investigations are carried out by two agencies: the International Trade Administration (ITA) of the Department of Commerce (the Department)—which investigates allegations of sales below fair value in anti-dumping cases, and the existence of subsidies in countervailing duty cases—and the ITC, which investigates injury allegations. If both agencies make affirmative final determinations, an anti-dumping or countervailing duty order imposes an additional duty on targeted merchandise equivalent to the 'dumping margin' or amount of subsidy.<sup>41</sup>

Following petitions filed by NewPage Corporation on behalf of the domestic industry concerning imports of coated free sheet papers from China, Indonesia and Korea, the Department initiated anti-dumping duty investigations in November 2006. One month later, the ITC preliminarily determined that there was a reasonable indication that imports of coated free sheet paper from the above

<sup>40</sup> This is fundamentally different from early settlement because this case terminated not as a result of agreement between parties, but rather because the U.S. had not yet imposed measures that could violate the WTO Agreements.

<sup>41</sup> Vivian C. Jones, *Trade Remedies and the WTO Rules Negotiations*, CRS Report for Congress, R40606 (7 June 2010), p. 4.

mentioned countries had been materially injuring the U.S. industry.<sup>42</sup> In May 2007, the Department preliminarily determined that coated free sheet paper from China was being, or was likely to be, sold in the U.S. at less than fair value.<sup>43</sup> The Department reached a final affirmative determination in October 2007 that China had been providing countervailing subsidies to its domestic producers and exporters of coated free sheet paper.<sup>44</sup> Yet, the ITC issued in December 2007 a final determination that no industry in the U.S. had been materially injured or threatened with material injury, and that the establishment of industry in the U.S. had not been materially retarded.<sup>45</sup> Countervailing duties were not ultimately imposed in this specific case, and thus China's complaint terminated dramatically prior to the panel stage.

## 2. China Gained Victories in Three Disputes

Through 2010, there are three rulings in favor of China in the WTO DSM.

- *U.S.-Steel Safeguards* (DS252): This case was initially filed by the EU. Eight other Members, including China, joined at a later stage. China fully participated in the Panel and Appellate Body proceedings. The Panel and Appellate Body ruled in favor of the complainants. For China, this victory has not been significant, because its steel exports to the U.S. remain quite small; in fact, China is a net importer of steel.<sup>46</sup>

- *U.S.-Poultry* (DS392): The measure primarily at issue was Section 727 of the Omnibus Appropriations Act of 2009, which effectively prohibits the establishment or implementation of any measures that would allow Chinese poultry to be imported into the U.S. by denying the use of any U.S. Department of Agriculture (USDA) funds for this purpose. The Panel ruled in China's favor in September 2009, but did not recommend that the DSB request the U.S. to bring the measure at issue into conformity with its obligations, as Section 727 had already expired. In other words, China won this case, but it seems the outcome confirmed that the bill that had expired violated WTO trade rules.

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<sup>42</sup> *Coated Free Sheet Paper from China, Indonesia, and Korea*, Order by the International Trade Commission, 71 FR 64983 (29 December 2006), summary.

<sup>43</sup> *Coated Free Sheet Paper from the People's Republic of China*, Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination by the International Trade Administration, 72 FR 30758 (4 June 2007), summary.

<sup>44</sup> *Coated Free Sheet Paper from the People's Republic of China*, Final Affirmative Countervailing Duty Determination by the International Trade Administration, E7-21046 (25 October 2007), summary.

<sup>45</sup> *Coated Free Sheet Paper from China, Indonesia, and Korea*, Final Order by the International Trade Commission, E7-24103 (7 December, 2007), para. 1.

<sup>46</sup> Hiro Lee and Dominique van der Mensbrugghe, *Quantitative Assessments of U.S. Safeguards on Steel Products*, Discussion Paper Series from Kobe University No. 160 (July 2004), p. 15.

- *EC-Fasteners* (DS397): This case, the first against the EU, can be considered China's biggest victory. The Panel condemned the EU's anti-dumping practice vis-à-vis exporters of alleged NMEs. Under the EU's regulation, anti-dumping duties were specified for the supplying country concerned and not for each supplier. Individual dumping margins were only specified for exporters that demonstrated their independence from the State.<sup>47</sup> The Panel found that there was no basis in the WTO Anti-Dumping Agreement to condition the granting of an individual margin and duty rate on compliance with "individual treatment", and thus Article 9.5 of the Anti Dumping Regulation violated WTO law. The amount of money involved in this case is not significant, but the ruling may force the EU to rethink and modify existing discriminatory legal provisions and specific methods in its trade remedy investigations. The EU or China might appeal but at this moment neither party has done so.<sup>48</sup>

### 3. The Rulings Against China

The WTO Panels ruled against China in its complaints concerning the U.S.'s non-market economy treatment and product-specific safeguards. China appealed these two Panel reports.

- *U.S.-Anti-Dumping and Countervailing Duties* (DS379): In this case, the WTO panel ruled in favor of the U.S. and upheld the right of the U.S. to impose both anti-dumping duties and countervailing duty measures on a range of Chinese imports. On 1 December 2010, China appealed. As of this writing, the Appellate Body is still considering this case.

- *U.S.-Tires* (DS399): China challenged the U.S.'s additional duties imposed on imports of Chinese tires through the TPSSM. The Panel ruled in favor of the U.S. and rejected all of China's claims. The Chinese Ministry of Commerce said it would "carefully examine the dispute settlement panel's report and appeal at an appropriate time to protect Chinese industries' legal rights and interests."<sup>49</sup>

Overall, in sharp contrast to the early settlement rate (64 per cent) when China was challenged, none of China's complaints reached early settlement. This does not help China gain adequate concessions from its respondents. Moreover, those WTO-inconsistent measures were maintained for at least the entire dispute

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<sup>47</sup> Council Regulation (EC) No 1225/2009 on Protection against Dumped Imports from Countries not Members of the European Community (the Basic Anti-Dumping Regulation), L 343/51, 30 November 2009, art. 9.5.

<sup>48</sup> In February 2010, China initiated the second complaint against the EU concerning similar antidumping duties imposed on shoes. As of this writing, the panel proceeding is ongoing, but the outcome of the *EU-Fasteners* dispute might have impact on the development of this case.

<sup>49</sup> Chinese Ministry of Commerce, *the Speech on the US-Tire Panel Report by the Officer in Charge in the Rules and Law Department* (Beijing, 14 December 2010), available at: <<http://gpj.mofcom.gov.cn/aarticle/subject/mymcyd/subjectss/201012/20101207305703.html>>.

settlement proceedings without any compensation for the harm done to Chinese industry. China also found it difficult to change its NME treatment and the U.S. product-specific safeguard, but it succeeded in challenging the EU's individual treatment regime in the initial DSB ruling.

#### **IV. CHINA AS A THIRD PARTY**

##### **A. China Has Been a Hyperactive Third Party, but With a Declining Third Party Participation Rate**

The DSU allows any WTO Member to participate as a third party during consultations and at the litigation stage when it believes a 'substantial interest' is at stake.<sup>50</sup> Third parties are entitled to make written submissions to the Panel, present an oral submission at a hearing, and receive all the original written submissions of the parties in a timely manner.<sup>51</sup>

During the studied period, Japan topped the list and participated in 102 cases as a third party, followed by the EU (98 cases) and the U.S. (80 cases). China participated in 71 WTO cases as a third party, ranking fourth among the 153 WTO Members. When we take into account China's recent accession, China has been the most active third party in the WTO with around eight cases per year, whereas Japan has been third party to about seven cases a year. Table 7 illustrates these findings below.

The third party participation rate illustrates how often a WTO Member participates as a third party in cases where it is eligible.<sup>52</sup> It is the share of actual third party cases among the total number of potential third party cases (i.e., cases to which a given WTO Member is not party). Between the establishment of the WTO and December 2010, 419 disputes were initiated in the WTO. The U.S., for example, was a party in 207 instances. Theoretically, the U.S. could have been a third party in the remaining 212 cases. In fact, it joined as a third party in 80 such cases. Therefore, the U.S.'s third party participation rate is 0.38 (80/212). For the other founding WTO Members, a similar calculation method applies.

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<sup>50</sup> DSU, art(s).4 .11, 10.2 and 17.4.

<sup>51</sup> DSU, art. 10.

<sup>52</sup> Any WTO Member can become a third party to a dispute, generally by simply indicating that it has an interest in the subject matter. Hence, a WTO Member could be a third party to all WTO cases except those in which it is a party.

**Table 7: Most Active Third Parties in the WTO DSM (Top 8)**

WTO Member	Japan	EU	U.S.	Canada	China	India	Brazil	Mexico
<b>Complainant (total)</b>	14	82	97	33	7	19	25	21
<b>Respondent (total)</b>	15	70	110	16	21	20	14	14
<b>Third Party (total)</b>	102	98	80	71	67	63	61	55
<b>Third party (per year)</b>	7	7	5	5	8	4	4	4
<b>Potential third party cases</b>	390	267	212	370	149	380	380	384
<b>Third party participation rate</b>	<b>0.26</b>	<b>0.37</b>	<b>0.38</b>	<b>0.19</b>	<b>0.45</b>	<b>0.17</b>	<b>0.16</b>	<b>0.14</b>

*Note:* Third party participation rate = total number of cases in which a WTO Member is a third party / potential third party cases.

However, China is not a founding Member, and only those cases following its accession need to be taken into account to enable comparison with the founding WTO Members. From the first dispute after China's accession (DS 243) to the last dispute in 2010 (DS 419), there were 177 complaints. Out of these 177 cases, China participated as a party in 28 instances. Therefore, the total number of potential third party cases was equal to 149 (177–28) cases. China was a third party in 71 cases, of which four cases were initiated before its accession. For the purpose of calculating the third party participation rate, these four cases are excluded. Thus, China's participation rate was 0.45 (67/149).

The analysis reveals that China has been the most active third party (participation rate is 0.45), followed by the U.S. (0.38) and the EU (0.37). Various reasons for China's high rate of third party participation exist. First, China has an economic interest to closely follow trade disputes potentially affecting its access to other WTO Members' markets. Second, when there is no direct economic effect, China may still have a systemic interest if the interpretation of a WTO rule or procedure potentially affects its future trade interests. Third, China may obtain information that could be useful for trade policy reforms. Finally, China could gain litigation experience and train its lawyers and governmental officials through third party participation.

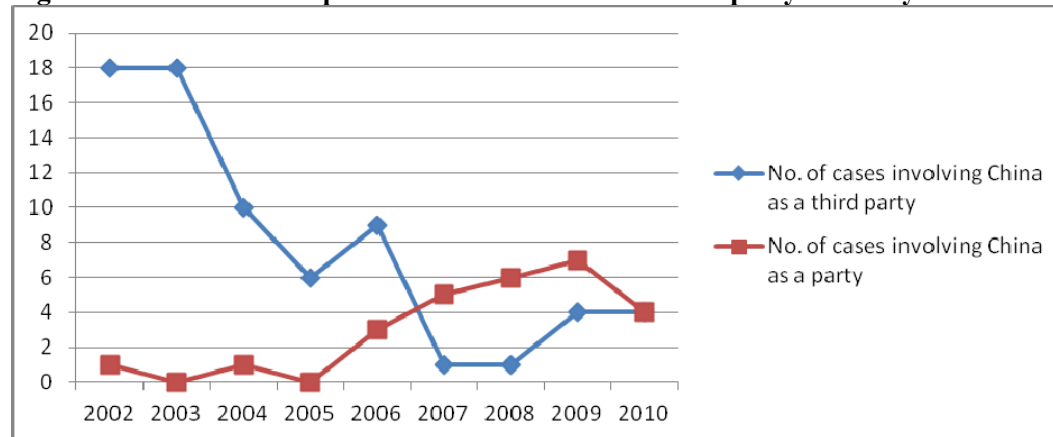
Nevertheless, China's third party participation rate has been decreasing over time. In the first two years following its accession, China participated as a third party in 36 disputes, which is more than half of its total participation since accession. From 2004 to 2006, it participated as a third party in 25 cases. Between 2007 and 2008, its participation dramatically declined to once per year. In the most recent two years studied, participation was four times per year.<sup>53</sup> A clear

<sup>53</sup> According to the year in which China notified the DSB to join as a third party, China joined 18



trend can be discerned: the number of third party cases has declined between 2002 and 2008 and has remained stable at about four cases a year, whereas the number of cases to which China is party increased from zero to a level of around five cases per year since 2006 (see Figure 1).

**Figure 1: China's Participation in the WTO DSM: Third party vs. Party: 2002-2010**



This pattern could be explained as follows. First, if a WTO Member is a party to a dispute, it cannot be a third party. Second, China soon adjusted its litigation strategy. According to an official of the Chinese Ministry of Commerce, three stages can be discerned. In the first phase, the 'latent observer' period (from accession to July 2003), China only participated in three out of 26 panel proceedings in which it was a third party. In the second stage (or 'full observer' period, from August 2003 to early 2007), China participated in all Panel proceedings. From 2007 onward—the current 'strategic observer' period—China has only selected important cases for third party participation.<sup>54</sup>

## **B. Trade Partners Monitored by China: the U.S., the EU, Korea and Mexico Stand Out**

Through third party participation, China has observed 26 trade partners, including American, Asian and European countries. The U.S. has been monitored the most (44 instances), followed by the EU (30 instances). The U.S. and the EU were

cases per year in 2002 and 2003, ten in 2004, six in 2005, nine in 2006, one per year in 2007 and 2008, and four per year in 2009 and 2010. See WTO, *supra* note 3.

<sup>54</sup> Wenhua Ji, *Commentary on China's Participation in WTO Dispute Settlement Activities in 2007*, 2 Journal of International Economic Law (2008), 298.

party to 61 of the 71 cases in which China was involved as a third party.<sup>55</sup> Korea and Mexico tied for third on China's monitoring list, each with 10 instances. China has also shown interest in disputes between Korea and Japan.

This reflects China's status as a major trading country that has a wide range of trading partners. Meanwhile, China has trade interests in the disputes involving major trade partners and competitors, such as the U.S., the EU, Korea and Mexico. For example, China is a large textile exporter to the U.S.. U.S. rules of origin for textiles greatly impact China's exports. In *U.S.-Textiles Rules of Origin*, initiated by India, China expressed its interpretation of the WTO Agreement on Rules of Origin, arguing the WTO inconsistency of the U.S. rules. In *Korea-Commercial Vessels*, initiated by the EU, China participated as a third party because it has a large shipbuilding industry; a decision on Korean subsidies would potentially affect China's subsidy policy.

### **C. China Is Learning to Deal with Anti-dumping and Subsidies Cases**

As a third party, China has primarily been involved in cases where agreements related to trade in goods were invoked (95 per cent). GATT 1994 is still the predominant agreement involved (42 per cent). The Agreement on SCM and the Anti-dumping Agreement also stand out (13 and 11 per cent, respectively), followed by the Agreements on Agriculture (eight per cent), SPS (six per cent), Safeguards (four per cent) and TBT (four per cent). Table 8 below provides an overview of the Agreements invoked by the complainant in cases where China was a third party.

One of the main areas of litigation against China has been subsidies, as observed in Section II. Anti-dumping and safeguards have been the major focus of China's complaints, as observed in Section III. Building up litigation experience and acquiring knowledge of these three areas from other countries have been motivating factors behind China's active involvement as a third party. In addition, China has demonstrated its interest in some new areas—such as import licensing procedures and customs valuation—so as to prepare itself for future involvement.

However, in comparison to the share of different agreements invoked in all WTO cases, China's third party participation does not reveal a specific interest in certain agreements.

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<sup>55</sup> 13 of the 61 disputes were between the U.S. and the EU.

**Table 8: China as a Third party—Agreements Invoked by the Complainant**

Agreement	Category	Invoked by complainant (number)	Invoked by complainant (share of total)	Invoked in all WTO cases (share of total)
GATT 1994	Goods	66	0.42	0.39
SCM	Goods	20	0.13	0.1
Antidumping	Goods	17	0.11	0.1
Agriculture	Goods	13	0.08	0.08
SPS	Goods	9	0.06	0.04
Safeguards	Goods	7	0.04	0.04
TBT	Goods	7	0.04	0.05
DSU	DSU	4	0.03	0.01
Import Licensing Procedures	Goods	3	0.02	0.04
Rules of Origin	Goods	3	0.02	0.01
Customs Valuation	Goods	2	0.01	0.02
TRIPS	IP	2	0.01	0.03
TRIMS	Goods	2	0.01	0.03
GATS	Services	1	0.01	0.03

## V. CONCLUSION

The study has shown how a major developing country has used the WTO dispute settlement system. Through December 2010, China was a party in 28 of the 419 WTO cases. Since 2007, the annual share of cases involving China as a party has been about one third. Half of the 2009 disputes included China as a party.<sup>56</sup> Therefore, whether active or passive, China has become a frequent user of the WTO DSM. This demonstrates China's trust towards the rules-based world trading system, and its willingness to peacefully settle international trade disputes through an independent third party under internationally agreed-upon rules.

As a late arrival to the WTO, China has recently emerged as its most frequent respondent. The U.S. and the EU have been the major complainants against China, in 11 and four cases, respectively. The main subject matter of the

<sup>56</sup>Between 2006 and 2010, the number of WTO cases per year was 20, 13, 19, 14 and 17, respectively. The number of cases involving China as a party was three, five, six, seven and five, respectively. Hence, China's annual participation rate was 15, 38, 32, 50 and 29 per cent, respectively.

complaints filed against China has been subsidies, services and trade-related investment measures. Many of these cases have involved industries that China wished to protect through transitional periods, such as automotive, financial and distribution services. As a respondent, China seems to have preferred to settle disputes through negotiation and compromise, rather than adjudication.

China has been a relatively inactive complainant, but is on its way to assertiveness. Almost all the seven complaints initiated by China targeted U.S. and EU trade remedies (i.e., anti-dumping and safeguard measures). China did not reach early settlement in any of its complaints against the U.S. or the EU. China also found it difficult to change its NME treatment and the U.S. product-specific safeguard, but it succeeded in challenging the EU's individual treatment regime in the initial DSB ruling.

Since its accession, China has become the WTO's most active third party. As its direct involvement in WTO dispute settlement has increased, China's third party participation rate has recently declined. The main trade powers monitored by China have been the U.S. and the EU. Mexico and Korea have also stood out in this regard. As a third party, China has shown a strong interest in disputes concerning anti-dumping and subsidies.

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